Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR07-468

	Opinion Delivered January 14, 2009
QUABINA RASHEEN PENSON APPELLANT	APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT, [NO. CR-2003984R]
V.	HONORABLE RALPH WILSON, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED: MOTION TO WITHDRAW GRANTED

ROBERT J. GLADWIN, Judge

This is a no-merit appeal from the revocation of appellant's suspended sentence. Appellant Quabina Rasheen Penson pled guilty to sale or delivery of cocaine on July 20, 2004, for which he was sentenced to ninety-six months' imprisonment in the Arkansas Department of Correction, followed by a thirty-six month suspended sentence, and assessed costs in the amount of $500. Penson was released on June 28, 2006, and the State filed a petition to revoke the suspended imposition of sentence on August 28, 2006, alleging that Penson violated the conditions of the suspension by (1) failing to pay fines, costs, and fees; (2) failing to report to parole as directed; (3) failing to pay supervision fees; (4) failing to notify the sheriff and his parole officer of his current address and employment; (5) violating conditions of his parole; and (6) possessing cocaine with intent to sell. The trial court granted Penson's motion for directed verdict as to grounds two through five, but denied the

motion as to grounds one and six. The directed-verdict motion was not renewed at the close of Penson's case,[1] and the trial court found by a preponderance of the evidence that Penson inexcusably failed to comply with the condition that required him to pay all fines, costs, and fees, and that he failed to comply with the condition that required him to live a law-abiding life in that he committed the crimes of possession of a controlled substance, resisting arrest, and fleeing. On October 24, 2006, the trial court sentenced Penson to eighteen-years' imprisonment. Penson filed a timely notice of appeal. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Supreme Court and Court of Appeals, Penson's counsel filed a motion to withdraw on the ground that an appeal in this matter would be wholly without merit. We grant counsel's motion and affirm the conviction.

An attorney's request to withdraw from appellate representation based upon a meritless appeal must be accompanied by a brief that contains a list of all rulings adverse to his client that were made on any objection, motion, or request made by either party. *Eads v.State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). The argument section of the brief must contain an explanation of why each adverse ruling is not a meritorious ground for reversal. *Id*. This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). If counsel fails to address all possible grounds for reversal, this court can deny the motion to withdraw and order rebriefing. *Sweeney v. State*, 69 Ark. App. 7, 9

[1]Following our supreme court's ruling in *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), the requirements of Rule 33.1 of the Arkansas Rules of Criminal Procedure regarding motions for dismissal and directed verdicts do not apply to revocation hearings.

S.W.3d 529 (2000).

Penson was provided a copy of his counsel's brief and was notified of his right to file a list of points on appeal within thirty days. He filed no points. The State did not file a responsive brief due to the absence of pro se points. On January 23, 2008, this court ordered rebriefing in this case because Penson's counsel's no-merit brief failed to list all adverse rulings with respect to the objections made during Penson's revocation hearing. *See Penson v. State*, No. CACR 07-468 (Ark. App. Jan. 23, 2008) (unpublished). Upon rebriefing, Penson's counsel again filed a no-merit brief and failed to comply with the requirements as set forth above. This court again ordered rebriefing on June 25, 2008. *See Penson v. State*, No. CACR07-468 (Ark. App. June 25, 2008) (unpublished). The third no-merit brief is before us, and it complies with the requirements.

Counsel contends that due to the low burden of proof placed on the State during a revocation hearing, and there being no reversible error, the lower court should be affirmed. He maintains that there was sufficient evidence before the trial court for it to have found by a preponderance of the evidence that Penson inexcusably failed to comply with a condition of his probation. We agree.

A circuit court may revoke a defendant's probation at any time prior to the expiration of the period of probation if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of her probation. Ark. Code Ann. § 5-4-309(d) (Repl. 2006); *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). The State need only show that the appellant committed one violation to sustain a revocation. *Richardson*

v. State, 85 Ark. App. 347, 157 S.W.3d 536 (2004). We give great deference to the trial court in determining the preponderance of the evidence, and we do not reverse the revocation unless the decision is clearly against the preponderance of the evidence. *Williams*, *supra*; *Richardson*, *supra*. Where testimony is conflicting, this court defers to the trial court's determinations with regard to the credibility of witnesses. *See Newborn v. State*, 91 Ark. App. 318, 210 S.W.3d 153 (2005).

Penson was charged with possession of cocaine with intent to sell, resisting arrest, and fleeing. At the pre-trial hearing held October 24, 2006, Penson moved for a continuance so that the new charges could be heard concurrent with the revocation. The State objected, and the trial court denied the continuance. Counsel for Penson contends that the trial court did not commit an abuse of discretion when it denied Penson's motion for continuance at the pre-trial hearing.

Pursuant to *Ellerson v. State*, 261 Ark. 525, 549 S.W.2d 495 (1977), revocation of a suspension for a subsequent crime prior to conviction of that crime is not an abuse of discretion. In *Ellerson*, our supreme court stated, "Where the decision turns, as it does here, upon the credibility of the witness, this court cannot say that there was an abuse of the circuit court's discretion. The trial court specifically found that the state's witnesses were the more credible." *Id.*, 261 Ark. at 530, 549 S.W.2d at 497. In the instant case, four witnesses testified. Two were police officers, another was a parole officer, and one was an employee of the sheriff's office. Counsel contends that the trial court was not in error in finding these witnesses credible regarding the allegations of cocaine possession and failure to pay fines.

The State need only prove by a preponderance of the evidence that the defendant inexcusably failed to comply with one condition of his probation. Even though the petition may allege multiple violations, the State need only prove one. *See Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). The direct testimony of the collector of fines and costs was that Penson was assessed costs in the amount of $500, and no payments had been made. Counsel maintains that Penson did not provide a reasonable excuse for failure to pay, and the lower court's ruling was proper. *See Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

Counsel asserts that the court's rulings on objections to parole officer Kyle Bruce's testimony did not prejudice Penson. The court overruled Penson's objection related to Bruce's testimony regarding Penson's reporting record and his payment of suspension fees. Any adverse ruling made by the trial court did not prejudice Penson because the trial court granted Penson's motion for directed verdict as to the following: failing to report to parole as directed; failing to pay supervision fees; failing to notify the sheriff and parole officer of his current address and employment; and violating conditions of his parole.

Also, the testimony of the police officers was that they approached a vehicle parked on the street, not directly in front of a house. When they approached the vehicle, they told Penson, who was in the vehicle and who had reached under the seat, to show his hands. Instead, Penson exited the vehicle and began to flee. Penson was observed throwing a package that was later retrieved and field-tested positive for cocaine. Counsel objected to the officers' conversation regarding the recovery of the object from the roof. The trial court

overruled the objection, holding that the officer was just stating what he had observed. A police officer can testify as to a present-sense impression pursuant to Arkansas Rule of Evidence 803.

The testimony further revealed that Penson refused to show his hands and started running, and officers claimed that he continued to refuse to cooperate with them until he was physically forced to do so. The trial court allowed the officer to answer over counsel's objection whether Penson was fighting with everyone who was trying to place him into custody. The court ruled that the officer could testify as to what he observed. Because the officer was not testifying as to what another witness had said, but as to what he had observed, no error was made. *See Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989).

Finally, counsel addressed the trial court's ruling that allowed into evidence the certified copies of Penson's no-contest plea to the charges of fleeing and resisting arrest. At trial, counsel made an objection to the introduction of two certified, faxed copies from district court reflecting that Penson pled no contest to fleeing and resisting arrest. The objection was that the revocation petition made no allegation as to fleeing or resisting arrest. The trial court agreed with the State's argument that fleeing and resisting arrest violated a condition of the suspension, but he also agreed with Penson's counsel that Penson was not put on notice as to the violation through the revocation petition. However, the trial court admitted the evidence of the no-contest plea as part of the surrounding circumstances of the possession-with-intent-to-sell charge. The State had an obligation to provide Penson with written notice of the alleged violations of conditions. However, the trial court did not

commit reversible error because intent to commit the offense of possession of cocaine may be inferred from Penson's conduct—fleeing and resisting arrest—and the surrounding circumstances. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995).

Because Penson did not provide a reasonable excuse for not having paid his fine and costs, nor having overcome the preponderance of the evidence as to having committed the crime of possession of cocaine with intent to sell, the lower court's ruling was proper. Therefore, a preponderance of the evidence supports Penson's revocation, and an appeal would be frivolous. Accordingly, we grant counsel's motion to withdraw and affirm the conviction.

Affirmed; motion to withdraw granted.

PITTMAN and GLOVER, JJ., agree.